85-1251

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

STATE OF TEXAS,

Petitioner,

V.

DANNY E. HILL, 47TH DISTRICT ATTORNEY

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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21 January 1986

QUESTIONS PRESENTED

1. Whether the Fifth Circuit's failure to recognize the Attorney General of Texas as the exclusive representative of the state's interest in federal litigation regarding the constitutionality of a Texas penal statute violates federal law and fundamental notions of comity by denying the state's right to control its participation in the federal judicial process.

2. Whether the Fifth Circuit's failure to recognize the Attorney General of Texas as the exclusive representative of the state's interest in litigation denies Texas law which designates the Attorney General as such a representative.

3. Whether the Fifth Circuit's granting of a motion to intervene which had not been acted upon by the district court and, which was filed by an unnamed class member who also improperly created the appeal was erroneous and misconstrued the proper role of appellate courts in the federal judiciary.

PARTIES TO THE PROCEEDING BELOW

The Plaintiff-Appellee below is Donald F. Baker.

The Defendant-Appellant below is Danny E. Hill, 47th District Attorney.

The Defendant-Intervenor below is the State of Texas.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner State of Texas, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 26, 1985.

REFERENCE TO OPINIONS

The opinion of the United States District Court for the Northern District of Texas, Dallas Division is reported at 553 F.Supp. 1121 (1982) and is reproduced as Appendix B in the Petition for Certiorari filed by Petitioner Donald F. Baker in this case.

The final judgment of the United States District Court for the Northern District of Texas, Dallas Division is unreported. A copy of this judgment is included as Appendix C in the Petition for Certiorari filed by Petitioner Donald F. Baker in this case.

The opinion supplementing the original opinion of the United States District Court for the Northern District of Texas, Dallas Division is reported at 106 F.R.D. 526 (1985) and is reproduced

as Appendix D in the Petition for Certiorari filed by Petitioner Donald F. Baker in this case.

The original panel opinion of the United States Court of Appeals for the Fifth Circuit is reported at 743 F.2d 236 (1984) and is reproduced as Appendix E in the Petition for Certiorari filed by Petitioner Donald F. Baker in this case.

The opinion of the United States Court of Appeals for the Fifth Circuit on rehearing *en banc* is reported at 769 F.2d 289 (1985) and is reproduced as Appendix A in the Petition for Certiorari filed by Petitioner Donald F. Baker in this case.

The opinion of the United States Court of Appeals for the Fifth Circuit on petition for rehearing *en banc* is reported at 774 F.2d 1285 (1985) and is reproduced as Appendix F in the Petition for Certiorari filed by Petitioner Donald F. Baker in this case.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit *en banc* was entered on August 26, 1985. A timely petition for rehearing was denied on October 23, 1985, and this petition for certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

United States Code, Title 28:

§ 2403. Intervention by United States or a State; constitutional question.

(b) In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law,

have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

Supreme Court Rule 28. Filing and service--special rule for service where constitutionality of Act of Congress or state statute is in issue.

.4(c) In any proceeding in this Court wherein the constitutionality of any statute of a State is drawn in question, and the State or any agency, officer, or employee thereof is not a party, the initial pleading, motion, or paper in this Court shall recite that 28 U.S.C. § 2403(b) may be applicable and shall be served upon the Attorney General of the State. In proceedings from any court of the United States as defined by 28 U.S.C. § 451, the initial pleading, motion, or paper shall state whether or not any such court, pursuant to 28 U.S.C. § 2403(b), has certified to the State Attorney General the fact that the constitutionality of such statute of the State was drawn in question.

Federal Rule of Civil Procedure 23. Class Actions.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate order:

(2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into action.

Federal Rule of Civil Procedure 24. Intervention.

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action:

(2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he

is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

STATEMENT OF THE CASE

Plaintiff Donald Baker filed suit on November 19, 1979 seeking a declaratory judgment that Texas Penal Code Ann. § 21.06 (Vernon 1974) (Homosexual Conduct) was unconstitutional. Thus, jurisdiction was properly based on 28 U.S.C. §§ 1331, 1343, 2201 and 2202. Plaintiff named Henry Wade, in his official capacity as Dallas County District Attorney, and Lee Holt, in his official capacity as Dallas City Attorney, as defendants representing a class of all district and city attorneys in the State of Texas.

Shortly after suit was filed, Defendant Holt filed a request for certification pursuant to 28 U.S.C. § 2403(b), requesting that the Attorney General of Texas be allowed to intervene to represent the state's interest. On June 3, 1980, the district court certified the case to the Attorney General and granted him leave to intervene.

The Attorney General appeared to defend the constitutionality of § 21.06 of the Texas Penal Code on July 9, 1980. After a trial on the merits, the district court declared § 21.06 unconstitutional on its face and enjoined defendants from enforcing it. Respondent Danny Hill, District Attorney of Potter County, was neither a named defendant nor a class representative.

Defendants Wade and Muncy, substituted for Defendant Holt, declined to appeal the decision of the district court. Danny Hill filed a notice of appeal on October 28, 1982. At that time, no named party had sought to appeal. The Attorney General of Texas filed a notice of appeal on behalf of the State of Texas on November 1, 1982. After reviewing the record which was then prepared, the Attorney General determined that the interests of the state would be best served by dismissing the appeal. The state's appeal was dismissed on March 18, 1983. On March 28, 1983, Hill tried unsuccessfully to have the Texas Supreme Court mandamus the Attorney General to pursue an appeal to the Fifth Circuit.

Hill on April 12, 1983, filed a motion to intervene and to be named class representative under Rules 23 and 24 of the Federal Rules of Civil Procedure in the district court. While the motion was pending, Hill filed a motion to intervene and be named class representative in the Fifth Circuit. On August 16, 1983, a Fifth Circuit judge granted Hill's motion. Two weeks before oral argument the district court denied Hill's motion.

On September 21, 1984 a panel of the Fifth Circuit held that the Texas Attorney General was presumptively an adequate representative of the state's interest and the Texas Attorney General's respresentation had been adequate in fact, and thus the district attorney was not entitled to interevene as of right to prosecute the appeal. *See Baker v. Wade*, 743 F.2d 236 (5th Cir. 1984).

On August 26, 1985, the Fifth Circuit in an *en banc* decision vacated the panel opinion of September 21, 1984, and held that the order allowing Hill's motion to intervene and be named class representative for purposes of pursuing the appeal was justified. The decision was rendered after the Attorney General of Texas intervened to protect the state's interest. *See Baker v. Wade*, 769 F.2d 289 (5th Cir. 1985) (en banc).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With The Opinions And Rules Of This Court, And With Federal Statutory Law.

This Court in its case law and rules, and Congress through statutory enactment, have chosen the states' attorneys general to speak for their respective states in federal litigation when the constitutionality of a state statute is at issue. The people of Texas through their Constitution and statutory enactments have chosen the Texas Attorney General as their chief law officer and entrusted him with the authority to represent and protect their interests in civl litigation. The Fifth Circuit in a nine-to-seven vote has now held that, whenever one of the 1085 district, county, and city attorneys of Texas is dissatisfied with the Attorney General's decision concerning litigation, any one of them may appeal a district court decision "on the *a priori* basis that all others are out of step and that he alone knows the

state's true interest." *Baker v. Wade*, 769 F.2d 289, 298 (5th Cir. 1985) (en banc) (Rubin, J. joined by Goldberg, Politz, Randall, Tate, Johnson, and Williams, J.J., dissenting). The Fifth Circuit's decision obstructs the administration of justice in the federal judiciary and impairs a state's right to control its litigation; it is a gross aberration that cannot be, and is not, the law.

In *New York v. Uplinger*, 104 S.Ct. 2332 (1984), a local district attorney defended the constitutionality of New York's loitering statute. After certiorari was granted, the New York Attorney General filed a brief as *amicus curiae* supporting the position that the statute was unconstitutional. Upon realizing the "fundamental conflict in the positions taken by [the local district attorney] and the New York Attorney General, a circumstance which was 'not manifestly or fully apprehended at the time certiorari was granted,'" the court dismissed the writ as improvidently granted. 104 S.Ct. 2333 n. 1, 2334. *Uplinger* established as a matter of federal law a priority scheme as to whom the federal judiciary will recognize to speak for the collective interests of a state: "[I]n addressing the constitutionality of a statute with state-wide application we consider highly relevant the views of the State's chief law enforcement official." 104 S.Ct. 2333 n.1.

The pronouncement in *Uplinger* is not a recent phenomenon. In fact, the Court has consistently recognized and protected a state's right to designate under its laws a chief legal officer who speaks for it in federal litigation.

In *Marino v. Ragen*, 332 U.S. 561 (1947), the concession by the Attorney General of Illinois that the procedure followed in a criminal trial denied petitioner due process of law led the Court to vacate the judgment and remand to the Circuit Court: "In light of the [Attorney General's] confession of error . . . we conclude that petitioner was denied the dur process of law which the Fourteenth Amendment requires." *Id.* at 562.

In *Little Rock & Ft. S. Ry. v. Worthen*, 120 U.S. 97 (1887), a board of railroad commissioners consisting of the governor, secretary of state and auditor of public accounts of Arkansas acting pursuant to the advice of the Attorney General of Arkansas appraised the property of railroads in contravention

of a state statute. The Court, in finding that the state had not deprived the companies of due process, recognized the importance of the state's attorney general: "When, therefore, under the advice of the attorney general, the board of railroad commissioners treated as invalid the direction of the statute . . . it obeyed the constitution rather than the legislature. . . . Here the conflict between the constitution and the statute was obvious, and the board had the advice of the highest legal officer of the State." *Id.*

Worthen and *Marino* implicitly recognize what *Uplinger* explicitly stated: only one official—a state's chief legal officer—is vested with the authority to represent and protect a state's interests in the federal judiciary.

The prominent position accorded to the states' attorneys general in the federal system is also evidenced by 28 U.S.C. § 2403(b) and Supreme Court Rule 28.4(c). Underlying both these provisions is the strong resumption that the attorney general of a state is the exclusive legal representative of a state's interest before the federal judiciary.

Congress in 28 U.S.C. § 2403(b)[1] provides that "in any action, suit, or proceeding in a court of the United States to which a State . . . is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene."

Supreme Court Rule 28.4(c) augments the scope of section 2403(b) by mandating that notice be given to the Attorney General of a state whenever the "constitutionality of *any statute* of a State is drawn in question." (emphasis added). *See* 13 J. Moore, Moore's Federal Practice ¶ 828.06 (2d ed. 1985).

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1. Congress, in section 2403(b), explicitly sought to give the states control of the appellate process through their attorneys general. *See* S. Rep. No. 204, 94th Cong., 2nd Sess. 9, *reprinted in* 1976 U.S. Code Cong. & Ad. News 1988, 1977.

These two provisions do not require notice or allow intervention by a local district attorney to represent a state in litigation concerning the constitutionality of a state statute. Congress and this Court have recognized the authority of a state's Attorney General to speak for that state as a matter of right whenever the constitutionality of a state statute is at issue. There is no evidence that Congress or this Court intended that local prosecuting attorneys should be vested with the authority to represent a state's interest in matters of statewide concern. *See* Supreme Court Rule 36.4 (the attorney general of a state files an *amicus* brief on behalf of the state whereas a local district attorney only files an *amicus* brief on behalf of the district); *cf.* Supreme Court Rule 28.4(c) (only a state attorney general is notified when the constitutionality of a state statute is involved).

The various decisions by this Court, as well as section 2403(b) and Rule 28.4(c), mandate the recognition of a state's chief law officer as the exclusive spokesperson on behalf of the interests of a state where the constitutionality of a state statute is in question. The Fifth Circuit's failure to entertain, much less consider, the views of the Attorney General of Texas violates this mandate.[2]

The underlying policy reasons for this mandate seek to protect both federal and state interests.

Allowing the *en banc* decision of the Fifth Circuit to stand would result in unmanageable litigation in the federal judiciary. It would allow the many thousands of city, county and district attorneys across the United States to assert as many different positions before this and every federal court. The result of exposing the federal judiciary to such unwarranted litigation is

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2. The Fifth Circuit has ignored its own authority. *See McGee v. Estelle*, 722 F.2d 1206, 1212 & n. 18 (5th Cir. 1983) (en banc) (quoting *Thompson v. Wainwright*, 714 F.2d 1495 (11th Cir. 1983), *cert. denied*, 464 U.S. 988 (1984)) ("the attorney general, as the chief legal officer of the state, is the appropriate person to" waive the requirement that a state prisoner exhaust his state remedies before seeking federal habeas corpus relief); *see also United States v. Texas*, 680 F.2d 356, 368 n. 16 (5th Cir. 1982) (attorney general's power to represent state agencies is exclusive).

the loss of a significant degree of administrative control possessed by this Court over federal litigation. *See McCarthy v. United States*, 394 U.S. 459, 463-65 (1969) (the Court's broad supervisory power over the lower federal courts includes the authority to establish proper construction to be given federal statutory enactments).

The wisdom of allowing a state to speak with a single voice becomes apparent when the interests of the state are examined.

In order to mantain law favorable to the state and to protect itself, Texas speaks with one voice to establish coherent and uniform legal policy. This state policy prevents the many local state attorneys from taking legal positions that are either in their self-interest or that would be detrimental to the state. *See Baker v. Wade*, 743 F.2d at 242-243.

Because it is the State of Texas that has the ultimate financial responsibility to fund any injunctive relief or pay any monetary judgments including attorney's fees under 42 U.S.C. § 1988, *Hutto v. Finney*, 437 U.S. 678, 699-700 (1978), the power to decide when to settle or when to pursue litigation is logically vested in one state-wide elected official, the Attorney General, who has an incentive to balance litigation costs with the objectives of litigation, and who can be held responsible for the balance he strikes:

> If Hill or any of the multitude of prosecuting attorneys may take it on himself to appeal an adverse ruling, the expense would not fall on Hill or on the other Horatius at the constitutional bridge or on his city or county but on the state.

Baker v. Wade, 769 F.2d at 298 (Rubin, J., dissenting).

The people of Texas can easily hold the Attorney General responsible for any litigation decision but they cannot hold a local state attorney accountable for a decision which, although not in the best interests of the entire state, was made with the tacit approval of his or her local constituency.

Under the Constitution of Texas, the Attorney General represents the state and conducts its litigation. In the instant matter, the Attorney General made the determination, after careful consideration of the trial court record and relevant case law, that an appeal would not serve the state's interest. When the people of Texas are dissatisfied, their remedy is the ballot box.

2. Failure To Reverse The Fifth Circuit Will Result In The Disruption Of A Delicate Balance Of Federal And State Relations Established Under The Constitutional System Of Federalism Which Insures The Protection Of State Sovereign Interests.

The federal system of government created by the Constitution established a national government operating in a mutual sphere of influence with state governments that act as independent political communities with the authority to make decisions of self-governance which "include the power to structure and organize the processes of government." La Pierre, *The Political Safeguards of Federalism Redux: Intergovenmental Immunity and the States as Agents of the Nation*, 60 Wash. U.L.Q. 779, 790-92 & nn. 31-33 (1982). *See Lane County v. Oregon*, 7 Wall. 71, 76 (1869).

This Court has specifically identified two incidents of self-governance which belong exclusively to the states. In *Coyle v. Smith*, 221 U.S. 559, 565 (1911), the Court held that a state, by virtue of "necessary attributes as an independent sovereign government" may determine for itself the location of the local seat of government. Similarly, the selection of who controls the civil litigation of a state is solely a matter of state law. *New York v. Uplinger*, 104 S.Ct. at 2333 n. 1.

Under the constitutional system of federalism, incidents of state sovereignty do not exist in a vacuum; without the assistance of this Court, Texas's designation of the Attorney General as its legal spokesperson is meaningless.

In two decisions one hundred and sixteen years apart this Court recognizes that the federal government must protect incidents of state sovereignty.

Chief Justice Chase in *Texas v. White*, 7 Wall. 700 (1869), discussed the effects of the Ordinance of Secession on the existence of Texas as a member of the Union. In concluding that Texas did not cease to be a state, he recognized that the "preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government." 7 Wall. at 725. *Texas v. White* is significant for the principle it represents; in sensitive matters of state and federal relations this Court has the authority and the duty to preserve and maintain incidents of state sovereignty.

Incidents of state political sovereignty also receive protection from the states' participation in the Federal Government itself. *Garcia v. San Antonio Metro. Transit Authority*, 105 S.Ct. 1005, 1021 (1985), held that limits on Congressional power under the commerce clause arise from the protection "inherent in all congressional action—the built in restraints that our system provides through state participation in federal governmental action." 105 S.Ct. at 1020. Because the states ultimately control federal legislation, "laws that unduly burden the States will not be promulgated." *Id.* at 1020. Thus, "state sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." 105 S.Ct. at 1018.

The states are represented in the judicial branch of the federal government by a designated chief legal officer under state law. Further, the states through congressional action in enacting 28 U.S.C. § 2403(b) have chosen to protect an important sovereign interest—whom they allow to control civil litigation involving the constitutionality of one of their statutes in the federal judiciary—through the legislative branch of the federal government. To allow an illegitimate representative—here a local district attorney—to speak for a state's interests nullifies the protection voiced in *Garcia*.

The Fifth Circuit by allowing Hill to take control of the civil litigation in Texas effectively vetoes section 2403(b), disregards *Garcia*, and tramples upon the sovereign right of Texas to

designate the Attorney General to control the civil litigation of Texas. Only this Court can restore the proper balance of state and federal relations the Ffith Circuit unbalances.

3. The Decision Below Directly Contravenes Texas Law.

The Fifth Circuit by its decision selects Danny Hill, a local district attorney, to control the civil litigation of Texas—a result directly prohibited by Texas law.

The Constitution of Texas designates the Attorney General as the chief law officer of the state responsible for representing the state in civil litigation. Tex. Const. art. IV, § 22, interp. commentary (Vernon 1984).

The Attorney General of Texas is one of six elected statewide constitutional officers. Tex. Const. art. IV, § 1. It is his duty to "represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party . . . and perform such other duties as may be required by law." Tex. Const. art. IV, § 22. Legislative enactment further echoes the constitutional provision by requiring the Attorney General to "prosecute and defend all actions in the [State] Supreme Court or the Courts of Civil Appeals in which the State may be interested." Tex. Rev. Civ. Stat. Ann. art. 4395 (Vernon 1976).

In contrast the Texas Constitution gives county and district attorneys only the authority to "represent the State in all cases in the District and inferior courts *in their respective counties [or districts].*" Tex. Const. art. V, § 21. (emphasis added).[3] County and district attorneys also have the exclusive control of criminal prosecutions. *See* Tex. Code Crim. Proc. Ann. arts. 2.01, 2.02 (Vernon Supp. 1985).

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3. The Texas Constitution limits the authority of a district attorney to his or her respective district. Pursuant to Texas legislative mandate "the District Attorney of the 47th Judicial District of Texas [the District represented by respondent Hill] shall only represent the State of Texas in the counties of Potter and Armstrong." Tex. Rev. Civ. Stat. Ann. art. 326k-36a (Vernon Supp. 1985). Both the Texas Constitution and the people of Texas through their legislature have silenced Respondent Hill to speak legally on an issue of state-wide signifcance.

The Texas Constitution thus creates a division of authority between local state attorneys and the Attorney General. The critical distinction lies in the scope of the two offices created: one is purely a local office; the other, a state-wide office. In a very early case the Texas Supreme Court emphasized that the important function of representing the state in cases where the state is a party belongs only to the Attorney General:

> Now let us ask the pointed question: Is it reasonable to suppose that it was the purpose to intrust absolutely the important function of representing the state as an attorney in all cases in which the state should be a party to the numerous county attorneys or to the district attorneys, should the Legislature see fit to create that office for certain districts, elected, as the case might be, in their respective counties or district, or to a general state officer, like the Attorney General, elected by the people of the whole state? To ask the question is to answer it. . . . Again, we cannot lose sight of the fact that the voters, especially in restricted localities, not infrequently are influenced by some improper motive, some sympathy for the candidate or some popular caprice which leads them to put incompetent men into office, a possibility by no means so probable in case of an important office like that of Attorney General in whose election all the voters of the state have the right to participate.

Brady v. Brooks, 89 S.W. 1052, 1056-57 (Tex. 1905).

By virtue of the fact that the Attorney General of the State of Texas is the sole officer authorized by law to protect the collective interests of the state in court, he is clothed with "broad judgment and discretion" and must remain free to exercise this discretion in an independent manner. *Charles Scribner's Sons v. Marrs*, 262 S.W. 722, 727 (Tex. 1924). This broad discretionary authority extends to decisions made concerning litigation in federal courts.[4]

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4. During the last session of the Texas Legislature, State Representative Bill Ceverha introduced legislation which would have restricted the authority of the Attorney General to enter into an out-of-court settlement or consent judgment on behalf of the state in any litigation pending in a federal court

(footnote continued on following page)

The decision whether to appeal a judgment is by necessity within the ambit of the Attorney General's discretionary authority. In *Bullock v. Texas Skating Ass'n*, 583 S.W.2d 888 (Tex.Civ.App.—Austin 1979, writ ref'd n.r.e.), the court upheld the authority of the Attorney General to appeal a judgment of a district court against the instructions of another state-wide constitutional officer—the Comptroller of Public Accounts:

> In matters of litigation the Attorney General is the officer authorized by law to protect the interests of the State, and . . . "must exercise judgment and discretion, which will not be controlled by other authorities." It was within the discretion of the Attorney General, not that of the Comptroller, to decide whether to appeal a case in which the State had experienced an adverse judgment in the trial court.
>
> 583 S.W.2d at 894 (citations omitted).

> The issue of who speaks for the state in civil litigation—the Attorney General of Texas or a local district attorney—has been implicitly decided by the Texas Supreme Court in the instant

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(continued from previous page)

which would result in a determination that a state statute, rule, practice, or policy is unconstitutional under state or federal law or that a state consitutional provision is unconstitutional under federal law, unless the state agency represented by the Attorney General consented to the settlement or judgment. Tex. H.B. 867, 69th Leg. (1985).

Ceverha's bill was defeated. Thus, Texas law by direct inference grants the Attorney General authority "to enter into an out-of-court settlement of a suit pending before a federal court that would have the effect of . . . declaring a state statute to be unconstitutional under federal law." House Comm. on State Affairs, Bill Analysis, Tex. H.B. 867, 69th Leg. (1985).

case.[5] After the state decided not to appeal the decision of the district court, respondent Hill petitioned the Supreme Court of Texas for a writ of mandamus to compel the Attorney General to appeal. On April 6, 1983, without a written opinion, the Texas Supreme Court denied Hill's motion for leave to file the mandamus. *Hill v. Mattox*, No. C-1973 (Tex. April 6, 1983).

Significantly, in the petition to the Texas Supreme Court, Hill himself acknowledged the Attorney General's stature as the chief legal officer of Texas: "no other state official . . . has the authority to represent the State of Texas." Petition for Writ of Mandamus at 2.

Thus the Fifth Circuit, by allowing Hill to appeal this case, grants a district attorney the authority to represent the State of Texas—a power directly prohibited Hill by Texas law.

4. The Fifth Circuit Decision Allowing Hill To Intervene Fundamentally Misconstrues The Role of Appellate Courts In The Federal Judiciary.

The Fifth Circuit decision allowing Hill to intervene was improper if not dangerous. Incredible as it may seem, the Fifth Circuit has allowed a non-party to create an appeal where he had no right to appeal and then to intervene in that same appeal:

> Determined to uphold the constitutionality of a Texas statute whatever obstacles bar the way, the majority opinion tramples every procedural rule it considers. No party to the suit has pursued this appeal, but the

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5. Because Hill is incapable of prosecuting this appeal under Texas law, the Fifth Circuit's *en banc* decision impermissibly injects itself into the internal affairs of Texas. *See Rizzo v. Goode*, 423 U.S. 362, 379-383 (1976). Under basic principles of comity and federalism this Court should protect the sovereign interests of Texas by not allowing Hill to prosecute the appeal before the Fifth Circuit and in the process nullify the effect of Texas law. *See generally Younger v. Harris*, 401 U.S. 37 (1971); *Hilton v. Guyot*, 159 U.S. 113, 163-164 (1895); 17 Wright, Miller & Cooper, Federal Practice and Procedure §§ 4241, 4251 (1978).

> majority opinion recognizes an appeal filed by a class member who was not a class representative at the time he filed his appeal, permits a so-called intervention to be filed in the court of appeals by the same class member who sought to intervene only in his own abortive-appeal. . . .

Baker, 769 F.2d at 293 (Rubin, J., dissenting).

Hill was not a party to the suit and did not have a right to appeal the district court judgment. Mere class membership did not accord Hill full party status. *See* Newberg, *Class Actions*, § 2830 (1977).

Further, Hill lacked standing to appeal on the basis that he was not an aggrieved party. Hill was not personally aggrieved by the judgment declaring the statute unconstitutional. Even assuming, *arguendo*, that the law was capable of enforcement before the judgment was entered, once the statute was declared unconstitutional, Hill no longer was under an official duty to enforce it. Hill has been aggrieved no differently than any other attorney, judge, or local prosecuting attorney in Texas who is bound to follow the laws. Since Hill suffered no "demonstrable, particularized injury" necessary to satisfy Article III standing requirements, Hill cannot prosecute an appeal.[6] *See Zablocki v. Redhail*, 434 U.S. 374, 380 n. 6 (1978).

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6. The standing limitations on the federal judiciary embodied in the "case" and "controversy" requirements of Article III require a court to consider constitutional as well as prudential factors before it exercises judicial power. *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

Inherent in the prudential element of Article III standing is respect for the operation of the other branches of government: "when transported into an Article III context, [the principle that a government should be given wide latitude in the operation of its own internal affairs], grounded as it is in the idea of separation of powers counsels against recognizing standing in a case brought . . . to seek a restructuring of the apparatus established by the executive branch to fulfill its legal duties." *Allen v. Wright*, 104 S.Ct. 3315, 3330 (1984). *See City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

Thus, standing may be denied on grounds that a suit interferes with the internal operations of an independent governmental entity. Insofar as Hill's participation in this suit restructures the internal organization of Texas government, he should be denied standing to prosecute an appeal.

A motion to intervene filed by a member of a class in an appellate court which had not been acted upon by a district court does not create appellate jurisdiction. "An intervenor by definition does not create a suit on appeal; he intervenes in an action that has already been undertaken." *Baker*, 769 F.2d at 295 (Rubin, J., dissenting). Because Hill could not, and did not have standing to appeal at the time he filed his motion to intervene, there was no appeal, and *a fortiori* intervention was impossible.

In the midst of its confusion the Fifth Circuit cast off all procedural shackles, violated the exclusive fact finding province of the federal district courts and found that intervention was proper under Rule 23(d)(2) and 24(a)(2) of the Federal Rules of Civil Procedure. *See* 7A C. Wright & A. Miller, Federal Practice and Procedure § 1791, at 192 (1972) (Rule 23 gives the *trial court* extensive power to control the conduct of class actions).

Even if consideration of Hill's motion to intervene was properly before the Fifth Circuit, Hill did not meet the requirements of Rule 24(a) for intervention.

Rule 24(a)(2) requires that the applicant for intervention establish all of the following four elements before intervention as of right is granted: (1) the application for intervention must be timely; (2) the applicant must have an interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest; (4) the applicant's interest must be inadequately represented by the existing parties to the suit. *New Orleans Public Service, Inc. v. United Gas Pipeline Co.*, 732 F.2d 452, 463 (5th Cir. 1984) (en banc).

Hill filed a notice of appeal; nine months later he filed a motion to intervene in that same appeal. A motion to intervene filed in an appellate court in an existing appeal by a non-party who was aware of the action in the district court is not timely. *See McKenna v. Pan American Petroleum Corp.*, 303 F.2d 778, 779 (5th Cir. 1962); *see also Baker*, 769 F.2d at 296 (Rubin, J., dissenting); *cf. United Airlines Inc. v. McDonald*, 432 U.S. 385, 390 (1977) (class member must timely assert his right to intervene in trial court).

The interest to be protected must be "direct, substantial,[7] and legally protectable." *New Orleans Public Service, Inc.*, 732 F.2d at 463. Hill did not have this kind of interest: he did not face expulsion from office if he complied with the district court judgment; he faced no monetary costs either in his personal or official capacities; he never showed that he ever enforced the law or was going to enforce it. Hill had no legally recognizable interest; Hill was not entitled to intervene simply because he would have ruled differently had he been the judge. *See Pate v. Dade County School Board*, 588 F.2d 501, 503 (5th Cir. 1985).

The Attorney General defended the interests of the state—the real party in interest—in the district court. Hill's only ground of inadequate representation is the class representatives' failure to appeal. Failure to appeal is only a factor in deciding whether representation has been adequate. *See Baker*, 769 F.2d at 297 (Rubin, J. dissenting). The core test for adequate representation, which Hill cannot meet, is whether the applicant for intervention can show "adversity of interest, collusion, or nonfeasance." *Bush v. Viterna*, 740 F.2d 350, 355 (5th Cir. 1984).

Intervention was improperly granted since none of the four requirements is met.

The Fifth Circuit's sponsorship of Hill's appeal deviates so substantially from accepted federal procedure that this ground alone justifies the granting of certiorari to review the judgment below.

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7. Hill's interest was neither direct or substantial. Hill's true interest was as an intervenor on behalf of an organization known as Dallas Doctors Against Aids (DDAA):

> Hill has not shown that he is the real party in interest in this case. Indeed, he has not participated in it in any way—and is being represented by a Dallas attorney, Wm. Charles Bundren, who was an incorporator and an attorney for DDAA. Under these circumstances, there should be at lease a minimal showing that it is Potter County or the Potter County District Attorney—and not DDAA or its attorneys—that is prosecuting these motions (and the attempt to retry this case).

Baker v. Wade, 106 F.R.D. 526 (N.D. Tex. 1985) (citations to footnotes omitted).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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21 January 1986

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(2)

No. 85-1251

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

STATE OF TEXAS,

Petitioner,

v.

DANNY E. HILL, 47TH DISTRICT ATTORNEY OF TEXAS, IN HIS OFFICIAL CAPACITY AS A DISTRICT ATTORNEY IN THE STATE OF TEXAS AND AS CLASS REPRESENTATIVE OF THE DEFENDANT CLASS OF ALL CITY, COUNTY AND DISTRICT ATTORNEYS IN THE STATE OF TEXAS, AND THE DEFENDANT CLASS,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED*

1. Whether the State of Texas has standing to petition this Court for a writ of certiorari and whether this Court has jurisdiction to entertain the State's Petition?

2. Whether merely questions of Texas state law are at issue, as opposed to matters of Federal-State regulations, and whether the Fifth Circuit correctly decided who can represent a state officer and the state in a federal court?

3. Whether the Fifth Circuit correctly determined that Hill was a proper appellant and could carry forward the appeal?

4. Whether the Fifth Circuit correctly determined that Texas law authorizes Hill to pursue the appeal and that the Attorney General has no authority to represent the defendant-class and its members?

5. Whether the Fifth Circuit decision allowing Hill to intervene was correct?

6. Whether the State has waived, and is estopped from asserting, any objection to Hill's standing and any argument that the State is the true party in interest?

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* In accordance with S.Ct. Rules 22.1 and 34.1(b), Hill certifies that all parties to the Fifth Circuit judgment sought to be reviewed are: Donald F. Baker, Appellee, and Danny E. Hill, 47th District Attorney of Texas, in his official capacity as a member of the Defendant-Class, and as the Class Representative of the Defendant-Class, and the Defendant-Class, all of whom will hereinafter be referred to simply as "Hill", Appellants below. The State of Texas informally sought leave to intervene or appear as an *amicus curiae* after previously withdrawing the State's appeal, but formal action was never taken by the Fifth Circuit on the State's request. The Texas Attorney General has assumed that the State was an intervenor before the Fifth Circuit. Neither the State of Texas nor the Texas Attorney General was a legitimate party before the Fifth Circuit Court of Appeals.

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A. STERN, E. GRESSMAN, & S. SHAPIRO, SUPREME COURT PRACTICE §6.16 at 340 (6th ed. 1986) 18

No. 85-1251

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

STATE OF TEXAS,

Petitioner,

v.

DANNY E. HILL, 47TH DISTRICT ATTORNEY OF TEXAS IN HIS OFFICIAL CAPACITY AS A DISTRICT ATTORNEY IN THE STATE OF TEXAS AND AS CLASS REPRESENTATIVE OF THE DEFENDANT CLASS OF ALL CITY, COUNTY AND DISTRICT ATTORNEYS IN THE STATE OF TEXAS, AND THE DEFENDANT CLASS,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinions below are discussed in Hill's Cross-Petition for Writ of Certiorari against the State of Texas, No. 85-1412, at 1-2 and Hill's Cross-Petition for Writ of Certiorari against Donald F. Baker, No. 85-1512, at 1-2.[1]

[1] There are two Petitions for Writ of Certiorari pending before the Court with respect to the Fifth Circuit *en banc* decisions reported at 769 F.2d 289 and 774 F.2d 1285. Action No. 85-1251 was filed by the State of Texas against Danny E. Hill (hereinafter referred to as the "State's Petition"). A similar and companion Petition for Writ of Certiorari was filed by the Plaintiff, Donald F. Baker, against Henry Wade, et al. and is referenced as No. 85-1225 (hereinafter referred to as "Baker Petition"). Hill filed a Cross-Petition against the State of Texas, No. 85-1412, and a separate Cross-Petition against Donald F. Baker, No. 85-1512. References to Hill's Cross-Petitions shall refer to the Court's docket numbers for the respective Petitions.

For the convenience of the Court and parties, references to the "Baker App." refer to the appendix to Petition for Writ of Certiorari in No. 85-1225, and references to the "Hill App." refer to the appendix to Cross-Petition for Writ of Certiorari in No. 85-1412. The Petitioner in No. 85-1251, the State of Texas, shall hereinafter be referred to simply as the "State." The Plaintiff and Appellee below who is the Petitioner in No. 85-1225, Donald F. Baker, shall hereinafter be referred to simply as "Baker."

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit, sitting *en banc*, was entered on August 26, 1985. A Petition for Rehearing *En Banc* was denied on October 23, 1985. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1254(1), but Hill denies that this Court has jurisdiction in two respects. First, as to Baker, he lacks standing to prosecute the present action (as explained fully in Hill's Brief in Opposition to Baker's Petition); consequently, this Court has no subject matter jurisdiction. Second, as to the State, it was at most an *amicus curiae* in the circuit court below, and an *amicus* cannot invoke jurisdiction of this Court under §1254(1) (as detailed fully below). Moreover, the State has refused to take a position on the constitutionality of the state statute challenged in this case; thus, there is no Article III case or controversy in this cause and so no jurisdiction in this Court over either the State's or Baker's Petition. Accordingly, both Petitions should be denied.

CONSTITUTIONAL PROVISIONS AND STATUTUES INVOLVED

A. Constitutional Provisions

Texas Constitution art. V, §21 is reproduced at Hill App. 11.

Texas Constitution art. XVI, §1 reads as follows:

> Members of the Legislature, and all other elected officials . . . shall take the following Oath or Affirmation: "I, , do solemnly swear (or affirm), that I will faithfully execute the duties of the office . . . and will to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and of this State . . . ."

B. Statutes

28 U.S.C. §2403(b) is reproduced at Hill App. 10.

Texas Penal Code §§21.01 and 21.06 are reproduced at Hill App. 8 and 9 respectively.

STATEMENT OF THE CASE

A full and complete statement of the case is included in Hill's Cross-Petitions, No. 85-1412 at 3-10, and No. 85-1512 at 2-9. The State has made the following misstatements of the facts of the case.

1. The State misstates the parties comprising the defendant-class (State's Petition at 4). The defendant-class consists of all district, *county* and city attorneys in the State of Texas.

2. The Attorney General did nothing in the district court to defend the constitutionality of §21.06 other than filing a four-page response to the notice of suit. The Attorney General did not list any issues or contentions for the State in the pre-trial order (R. Vol. II at 339).

3. Hill was named as a defendant by being a member of the defendant-class and was, at the time the class was certified and is at the present time, a district attorney in the State of Texas.

4. The Attorney General was not a party to the appeal at the time the panel decision was rendered on September 21, 1984, nor at the time of the Fifth Circuit *en banc* decision on August 26, 1985. Both decisions of the Fifth Circuit were rendered after the Attorney General had withdrawn the appeal on behalf of the State. In the State's Petition, the Attorney General implies that the State was a party at the time of the Fifth Circuit opinions. The implication is incorrect.

The State's bare-bones statement of the case in its Petition omits important factual and procedural aspects of this case's history. Hill's Cross-Petitions clarify the omissions and misstatements by the State. It is important to note that in the State's Statement of the Case, the State admits that the Attorney General's involvement was only to represent "the state's interest." (State's Petition at 4, 5).

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS NO JURISDICTION TO ENTERTAIN THE PETITION FILED BY THE STATE OF TEXAS

Hill moves the Court, under Supreme Court Rule 22.3, to dismiss the State's Petition because the State was not a party in the court below or, in the alternative, to dismiss the State's Petition on jurisdictional grounds.

A. Only A Party Can Petition For Certiorari To This Court, And Neither The State Of Texas Nor The Texas Attorney General Was A Party Before The Fifth Circuit *En Banc*

The Court's jurisdictional grounds to hear appeals by writ of certiorari is premised upon 28 U.S.C. §1254(1) which provides:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> > (1) By writs of certiorari granted upon the petition of *any party* to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. §1254(1) (emphasis added).

Only persons who are parties to the action below have a right to petition this Court for writ of certiorari. The State was not a party in the action below. The State initially filed a notice of appeal but thereafter withdrew the State's appeal by formal motion and letter (Hill App. 2 and 3). The State did not participate in the briefing and oral argument to the Fifth Circuit panel. After the Fifth Circuit granted rehearing *en banc,* the State sent a letter to the Fifth Circuit asking permission to participate in the *en banc* hearing. The State never filed a formal motion to intervene as a party. By order dated March 4, 1985, Chief Judge Charles Clark directed the State to file a brief outlining the procedural history of the case and the authority of the State to reintervene in the case once the State had dismissed

its appeal. The State's brief filed on or about March 29, 1985 did not directly address the intervention issue. No further orders were entered by the Fifth Circuit with respect to the right of the State to intervene in the case. Thus, the State was never granted permission to intervene as a party, and its participation in the *en banc* hearing was merely as an *amicus curiae,* if that. (Hill's Cross-Petition, No. 85-1412, at 10-20 contains additional arguments and authorities with respect to the non-party-status of the State under 28 U.S.C. §2403(b) regarding the appeal of this case and the State's participation in the *en banc* hearing. In the interests of brevity Hill directs the Court's attention to that Section of Hill's Cross-Petition against the State.)

Consequently, because the State withdrew its appeal as a party, its participation in the *en banc* hearing was merely as an *amicus curiae,* if at all. An *amicus curiae* is not a "party" for purposes of 28 U.S.C. 1254(1), and, thus, the State is not entitled to seek review in this Court by certiorari. *See In re Leaf Tobacco Board,* 222 U.S. 578, 581 (1911); *Ex parte Cutting,* 94 U.S. 14, 20-22 (1876); *International Union, United Auto., Aerospace & Agr. Implement Workers of America, AFL-CIO, Local 283 v. Scofield,* 382 U.S. 205 (1965). Indeed, Baker's Petition virtually admits this non-party and non-interested status of the Attorney General in this case when it requests the Court (apparently under the Court's Rule 36.4) to treat the Attorney General's Petition herein as an *amicus* brief because of the ambiguities "as to whether the Attorney General of Texas was a party in the court below." (Baker's Petition at 9 n.18).[2]

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[2] Significantly, Supreme Court Rule 36.4 itself draws a distinction between the appropriate legal representative for a State and "the authorized law officer" for a political subdivision of a State. The latter may file an *amicus* brief with the Supreme Court on behalf of his political subdivision of a State without obtaining the consent of any other person or party, including, apparently, the attorney general of that State. This Rule treats the attorney general of a State as the authorized legal representative of the State entity only. Hill contends, of course, that he is "the authorized law officer" for his political subdivision of Texas, Potter and Armstrong Counties, and that he may thus act independently of the Attorney General, a representative of the State.

B. No Article III Case Or Controversy Exists With Respect To The State Or The Attorney General Because The State Has Refused To Assert A Position On The Constitutionality Of Section 21.06.

The Attorney General has repeatedly disavowed, both explicitly and implicitly, any intention to address or support the constitutionality of §21.06 in this case.[3] Moreover, the State's brief to the Fifth Circuit *en banc,* at 11, specifically admits that the State sought intervention on appeal only "to defend his [the Attorney General's] exclusive right to represent the State's interests before this Court." The brief itself studiously avoided addressing the constitutionality of §21.06, even though the Fifth Circuit's March 4, 1985 order explicitly invited the Attorney General to brief that issue.[4]

In a similar case, this Court held that it had no jurisdiction and dismissed the suit for lack of any Article III case or controversy. *Princeton University and New Jersey v. Schmid,* 455 U.S. 100 (1982).[5] Precisely the same conclusion should be

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3. For example, in response to the Attorney General's February 20, 1985 letter to the Fifth Circuit requesting intervention at the *en banc* stage (Hill App. 5), Hill's counsel telephoned the Attorney General, who admitted that he sought to intervene only to address the issue of Hill carrying forward the appeal and that he would not address the constitutionality of §21.06. *See* February 25, 1985 letter of Hill's counsel to Fifth Circuit (Hill App. 7).

4. The State's Petition to this Court (No. 85-1251) also fails to address the issue of the constitutionality of §21.06.

5. In *Princeton,* an individual was convicted of criminal trespass upon Princeton University's property in New Jersey, and the defendant appealed through the New Jersey courts. At the New Jersey Supreme Court level, Princeton University intervened as a party, and after that court reversed the lower court's judgment, both the State of New Jersey and Princeton University filed a joint notice of appeal and jurisdictional statement to this Court. The New Jersey Supreme Court had found the state criminal trespass statute unconstitutional, but in the State's brief to the United States Supreme Court, the New Jersey Attorney General deemed "it neither necessary nor appropriate to express an opinion on the merits" of the constitutionality of the statute. 455 U.S. at 101. In a *per curiam* opinion expressing the unanimous view of the eight participating Justices, this Court found that since the state "declined to take a position on the merits," there could be no case or controversy and: "We do not sit to decide hypothetical issues or to give advisory opinions." 455 U.S. at 102. The Court thus dismissed the appeal, even though the other party appellant, Princeton University, wanted to continue the appeal.

reached in this action. This cause should be dismissed and the Petitions denied, even though Baker himself may still be interested in the case, because the Texas Attorney General has failed and refused to assert a position on §21.06's constitutionality.

II.

FEDERAL-STATE RELATIONS ARE NOT AT ISSUE, MERELY QUESTIONS OF TEXAS STATE LAW THAT WERE DECIDED CORRECTLY BY THE FIFTH CIRCUIT.

A. This Issue Involves Merely A Matter of Texas Law Regarding Who Can Represent A State Officer And The State Of Texas In A Federal Court.

The State argues that the question of whether Hill or the Attorney General may carry forward the appeal in this case is a highly significant issue requiring this Court's attention. To the contrary, this issue involves merely a matter of Texas state law regarding which state officers may represent themselves in a federal forum. While Hill agrees that the Fifth Circuit determined this issue correctly in his favor, Hill suggests that this purely state-law issue is not a proper subject for Supreme Court review.

This Court has frequently held that a petitioner's challenge to state-law determinations made by a United States circuit court will rarely constitute an appropriate subject of Supreme Court review.[6] Recently, this Court announced that: "The allocation of authority among state officers to represent the state before this Court is . . . wholly a matter of state concern." *New York v. Uplinger*, 467 U.S. 245 n.1, 104 S.Ct. 2332, 2333 n.1 (1984). This Court has also expressly declared that among the grounds for the Court to deny certiorari is the fact that the decision below may be supportable as a matter of state law.

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[6] *Haring v. Prosise*, 462 U.S. 306, 103 S. Ct. 2368, 2373 n.8 (1983). *See also Bishop v. Wood*, 426 U.S. 341, 346 (1976) (Court normally accepts any reasonable construction of state law by the Court of Appeals, even if a separate examination of state law might justify a different conclusion).

Maryland v. Baltimore Radio Show, 338 U.S. 912 (1950). Texas law supports Hill's standing in the instant cause to carry forward his appeal, and the State's challenge to this state law determination by the Fifth Circuit should not constitute an appropriate topic for this Court's consideration.

B. Principles of Comity And Federalism Support The Decision Of The Fifth Circuit.

The true principles underlying federal-state comity require that this Court allow the Texas Legislature, not the histrionics of a single state official (the Attorney General) nor the idiosyncrasies of a single federal trial judge, to determine the validity and continued vitality of §21.06. The Texas Legislature has consistently refused to repeal §21.06 at the behest of homosexual activists in that State, thus indicating that the will of the people of Texas is to maintain §21.06 as a viable state statute. Indeed, as Judge Reavley has cautioned: "Moral issues should be resolved by the people, and the laws pertaining thereto should be written or rescinded by the representatives of the people." 774 F.2d at 1287. This Court should not disturb the announced will of the people of Texas represented by §21.06.

III.

THE FIFTH CIRCUIT CORRECTLY DETERMINED THAT HILL WAS A PROPER APPELLANT AND COULD CARRY FORWARD THE APPEAL.

A. Neither Hill Nor The Original Class Representatives Represent The State. Hill Is A Defendant And The Class Representative On Appeal.

Throughout the State's Petition, the State asserts that Hill purports to represent the interests of the State. Hill has previously denied, and continues to deny, that Hill represents, or is attempting to represent, the interests of the State. The essential fallacy in the State's Petition and argument is the Attorney General's persistent, erroneous assumption that Hill purports to represent the interests of the State. He does not.

Hill represents his own interests in his official capacity as a member of the defendant-class and as the class representative of the defendant-class. Hill now stands in the shoes of the original class representatives.

Neither the original class representatives nor Hill have ever attempted to represent the State. If the original class representatives were present before this Court, could the State seriously argue that they do not have standing to appeal the adverse judgment against the defendant-class? Hill has been properly substituted as the class representative and that order of substitution has not been attacked by the State or Baker. The State continually misleads the Court by misstating the interests of Hill.

The State was a totally separate and distinct party from Hill and other members of the defendant class. The actions of the State (as the Attorney General himself represented to the Supreme Court of Texas in related mandamus proceedings) in withdrawing its appeal did not affect the rights of Hill to continue with the appeal as a member of the defendant-class and as the class representative. In noting this simple, straightforward distinction, the Court can see through the confusion the State's Petition seeks to create.

B. The Attorney General Never Purported to Represent The Interest of Hill or The Defendant-Class.

The Attorney General has never purported to act on behalf of the defendant class and its members. In fact, in his letter to the Court notifying the Court that he was withdrawing the State's Notice of Appeal, the Attorney General stated:

> We are aware that a notice of appeal has been filed by Mr. Hill, the District Attorney of Potter County and we have advised him of our determination not to further prosecute the appeal. *I assume you will be hearing directly from his office as to his intentions with respect to a continuation of the appeal on behalf of his office.*

(Hill App. 2) (emphasis added). Further, prior to the trial court's Memorandum Opinion of August 17, 1982, the attorney general filed only one pleading: a four-page "Response of the State of Texas" filed on July 9, 1980. (R. Vol. 1 at 79-82). The

Response was filed on behalf of the State, not Hill or the defendant-class.

After the trial court's ruling on attorney's fees, the Attorney General filed only two additional pleadings: a Notice of Appeal (R. Vol. IV at 874) and a Motion to Withdraw Appeal (Hill App. 3). Again, these pleadings were filed on behalf of the State, not Hill. None of the pleadings filed by the Attorney General indicate that the Attorney General was representing Hill. Additionally, in the certificate of service to the State's Motion to Withdraw Appeal, the Attorney General certified service of the Motion to Jim Barber, Appellee's counsel, and "Danny Hill." Obviously, based upon these facts, the Attorney General intended to represent only the State and considered Hill a proper and distinct party-Appellant. The State now takes a contrary position.

The State's position before this Court is diametrically opposed to the statements made by the Attorney General to the Supreme Court of Texas. In response to a mandamus action by Hill and others against the Attorney General to compel him to continue the appeal of this case, the Attorney General, on behalf of the State, told the Supreme Court of Texas that "Petitioner Hill has already filed a timely notice of appeal in the Fifth Circuit of the very decision they seek to have appealed."[7] Hence, the Attorney General took the position before the Supreme Court of Texas that Hill was a proper appellant before the Fifth Circuit and that he could continue the appeal. Now, in a different forum, the Attorney General takes a totally inconsistent position with respect to Hill's right to appeal. Which position does the Attorney General wish the Court to believe? The State should not be allowed to change its position with respect to Hill's standing after Hill prevailed in the Fifth Circuit. The Attorney General's admissions to the Texas Supreme Court are but one example of the State's inconsistency with respect to Hill's status as a party.

The Attorney General misleads the Court by implying that the Attorney General and the State were actively involved in the defense of §21.06 at the trial court level. In fact, with the exception of the filing of a four-page "Response," the Attorney

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7. *Baker v. Wade*, 769 F.2d 289, 291 (5th Cir. 1985) (*en banc*).

General did absolutely nothing to defend the constitutionality of §21.06. The defense of the statute was conducted entirely by the class representatives, Henry Wade, District Attorney for Dallas County, Texas, and Lee Holt, City Attorney for the City of Dallas. The Attorney General did not participate in the filing of any pre-trial motions; did not conduct any discovery; did not offer any trial testimony; did not actively, if at all, participate in the trial; and, did not participate in trial strategy for the defendant-class. Indeed, the Attorney General did not even take any position in, or execute, the pretrial order, even though representatives of all other parties did.

Instead of concentrating his activities on the defense of §21.06, the Attorney General, after withdrawing the State's appeal of the trial court's judgment, has expended considerable time and effort to interfere with and, apparently, hopefully prohibit Hill from pursuing the appeal. The coordinated effort of the Attorney General and Baker to deny Hill the right to appeal is underscored by the Attorney General's reliance upon Baker's appendix to Baker's Petition and the concerted effort of both the State and Baker to attack Hill's right to appeal. It is interesting that the Attorney General would so vigorously seek to deny Hill the right to appeal but fail to vigorously defend the constitutionality of a state statute. It appears that the Attorney General has some vested interest in repealing §21.06 without legislative involvement. Surely the Attorney General will admit that the State's Petition and arguments, if successful, will assist Baker in overturning §21.06; a statute the Attorney General swore to uphold.[8] Neither the State nor the Attorney General are a proper party to defend §21.06. Hill is the proper party. The Attorney General is working against the true interest of defending §21.06.

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[8] Tex. Const. art. XVI, §1.

IV.

THE FIFTH CIRCUIT CORRECTLY DETERMINED THAT TEXAS LAW AUTHORIZES HILL TO PURSUE THE APPEAL AND THAT THE ATTORNEY GENERAL HAS NO AUTHORITY TO REPRESENT THE DEFENDANT-CLASS AND ITS MEMBERS IN THIS ACTION.

The authorities cited by the State in its Petition are all inapposite to the question of who may appeal an adverse judgment against the defendant-class. The authorities cited by the State merely stand for the general proposition that the Attorney General represents the interests of the State in limited circumstances. Hill does not purport to stand in the shoes of the Attorney General to represent the interests of the State. Consequently, the State's authorities and arguments with respect to this issue are irrelevant. The true question is: Who is the proper representative of the defendant-class on appeal? It certainly is not the Attorney General of Texas, nor the State, neither of whom ever purported to represent the defendant-class. The proper representative of the defendant-class is the class representative or a class member that has been adversely affected by the Court's judgment—class member/representative Hill.

The Fifth Circuit correctly disregarded the irrelevant assertions of the State concerning its role in the appeal. The Attorney General abandoned any interest he may have in this appeal by filing his Motion to Dismiss. Nevertheless, assuming *arguendo* that the State has some interests left in this appeal, Texas law does not grant the Attorney General the exclusive right to represent the State in all circumstances.

A. The Texas Constitution

Article IV, Section 22 of the Texas Constitution, in applicable part states: "[The attorney general] shall represent *the State* in all suits and pleas in *the Supreme Court of the State* in which the State may be a party, ..." (emphasis added). TEX. CONST. art. IV, §22. This provision of the Constitution, by its own words, only gives the Attorney General the authority to represent *the State* in suits before *the Supreme Court of the*

State of Texas. Because the State of Texas withdrew its appeal and did not properly reintervene on appeal, the State is no longer a party. For that reason alone, Art. IV, Section 22 is inapplicable. Further, it is obvious that this is not an action before the Supreme Court of Texas; thus, the Texas Constitution and the State's references to it are invalid.

B. Article 4395

The State's reliance on Article 4395 of the Texas Revised Civil Statutes is misplaced. That statute states: "The Attorney General shall prosecute and defend all actions *in the Supreme Court* or the *Courts of Civil Appeals* in which the State may be interested." Tex. Rev. Civ. Stat. Ann. art. 4395 (Vernon 1976) (emphasis added). Again, the Attorney General's authority to "defend" is limited only to those actions in which the State is involved. Further, the Attorney General's power only extends to two courts: the Supreme Court [of Texas] and the "Courts of Civil Appeals." The phrase: "Courts of Civil Appeals," refers to the Texas intermediate Courts of Appeals as defined by Article 5, Section 6 of the Texas Constitution. TEX. CONST. art. V, §6. Article 4395 does not give the Attorney General the authority to represent the State in actions before federal courts.

None of the statutes cited by the State confirm that (i) the State is the exclusive real party in interest or, more importantly, (ii) that the Attorney General is the proper representative of the interests of the defendant-class. Texas decisions confirm the limited authority of the Attorney General.

In *Charles Scribner's Sons v. Marrs*, 262 S.W. 722 (Tex. 1924), the Texas Supreme Court merely interpreted whether Article 2909n of the text book statute of Texas gave exclusive authorization to the Attorney General to determine pursuant to that statute whether to bring suits on behalf of the State to test the validity of contracts executed under this law. The Court found that the Attorney General was *authorized by that statute* to exercise judgment and discretion in determining whether to bring any such action. Neither the holding in *Charles Scribner's Sons* nor Article 2909n authorizes the Attorney General to speak for, or defend, the district, county, and city attorneys of Texas in a federal court action to restrain the exercise of their lawful and responsible duties.

The Attorney General's reliance upon *Bullock v. Texas Skating Assn*, 583 S.W. 2d 888 (Tex. Civ. App.—Austin 1979,

writ ref'd n.r.e.), (cited at 14 of State's Petition) is equally misplaced. *Bullock* was a taxation case; it did not involve a class action or an injunction against district, county, and city attorneys. The question before the court was whether or not the comptroller, in the exercise of his *administrative duties*, had the authority to bring litigation to a halt. The court found that the comptroller did not because his *statutory powers* had ended. *Bullock* is distinguishable for several additional reasons. First, the plaintiff initiated the suit under Article 1.05, Title 122A, Taxation-General which provides, in relevant part:

> Such suit shall be brought against the public official charged with the duty of collecting such tax or fees, the State Treasurer *and the Attorney General.*

TEX. TAX-GEN. ANN. art. 1.05 (1960). The express language of the statute makes the attorney general a party. Second, it was a case before a Texas Court of Civil Appeals. (Article 4395). Third, the plaintiff was not seeking an injunction against any state officer's performance of his official duties. Lastly, the Attorney General has the statutory responsibility to advise all State Department heads such as the Comptroller, TEX. REV. CIV. STAT. ANN. art. 4399 (1977), and to defend the Comptroller in suits brought against him, his office or the State. TEX. REV. CIV. STAT. ANN. art. 6252-26 (1975). Thus, the Attorney General's representation of the Comptroller in *Bullock* is nothing more than what he is required to do by specific statute.

Brady v. Brooks, 99 Tex. 366, 89 S.W. 1052 (1905), is likewise misinterpreted by the Attorney General. The Attorney General cites *Brady* for the general proposition that he is entrusted with "broad judgment and discretion." (State's Petition at 13). In *Brady* a dispute arose between the rights of the county attorney of Travis County and the District Attorney to prosecute suits brought by the attorney general to recover taxes and penalties under the "Kennedy Bill" and the "Love Tax Bill" passed by the Texas legislature. Both of these statutes authorized the Attorney General to bring suit in the name of the State to collect taxes, penalties and forfeitures.

The question before the Texas Supreme Court in *Brady* was whether the provisions in the Kennedy Bill and the Love

Tax Bill providing for suit to be prosecuted by the Attorney General were constitutional in light of Article 5, Section 21 of the Texas Constitution which gives the County and District Attorneys the authority to represent the State in their respective counties. The Court determined that Article 5, Section 21 of the Constitution did not prohibit the State legislature from specifically authorizing the prosecution of a suit by the attorney general.

In reaching its decision, the Texas Supreme Court stated: "It is *by virtue of the authority granted by these statutes* (the Kennedy Bill and the Love Tax Bill) that the Attorney General has assumed to act in these cases" 89 S.W. 1053 (emphasis added). The reasoning and findings of the court do not support the State's expansive view of the rights of the Attorney General. It was only by virtue of the specific legislation passed by the Texas Legislature that the Attorney General had the authority to act at all.

The Attorney General's authority to act as the legal representative for the State and for State Department heads, employees or officers is limited by the Texas constitution and numerous Texas statutes. For instance, the Attorney General is responsible for defending state district judges in any action or suit in federal courts in which the judge is a defendant because of his office as district judge if the district judge requests the Attorney General's assistance. TEX. REV. CIV. STAT. ANN. art. 4412b (1975). It is interesting to note that this statute does not give the Attorney General the responsibility to defend *county* judges and it is expressly limited to "any action or suit in the federal courts." Arguably, in any action or suit in state court, this statute would not give the Attorney General the authority to represent a state district judge.

The Attorney General's authority is further limited by decisions of the Texas Supreme Court. In *Garcia v. Laughlin,* 285 S.W.2d 191 (Tex. 1955), the Texas Supreme Court held that the Attorney General does not possess the power to institute proceedings for removal of a county commissioner. 285 S.W.2d at 195. In reaching its decision, the Court stated "[i]n the absence of a *specific legislative enactment* we believe that the Constitution provides for either the district attorney or the county attorney, jointly or singly, in the event either fails to act, to be the proper officer to represent the State in the district

court." 285 S.W.2d at 195. The *Garcia* Court also acknowledged that the authority of the Attorney General in *Brady* "to prosecute the suits was sustained under a *legislative act* . . . ." 285 S.W.2d at 196 (emphasis added). Thus, in the absence of specific legislation, the Attorney General does not have the authority to represent the district, county and city attorneys in federal court actions brought against them to restrain their enforcement of a state statute. If the State legislature wishes to grant the Attorney General that authority, it may do so; but, it has not done so.

Despite devoting thousands of words to their argument, neither the Attorney General nor Baker have cited any authority which holds that the Attorney General is the exclusive officer to act for all district, county and city attorneys in a federal suit against them challenging the constitutionality of a state statute.[9]

C. Under Texas Law, The Attorney General May Issue Formal Legal Opinions, But Such Opinions Do Not Bind Other State Agencies, Officers, Or Courts, Who May Assert In Court Positions Contrary To The Attorney General.

In addition to the authorities cited above, analogous State law demonstrates that the Attorney General is not all powerful and cannot bind other State agencies, officers, or courts with his opinions.

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9. Typical of the Attorney General's arguments is the one constructed upon the comments of a Texas House Committee upon the non-passage of legislation sponsored by State Representative Bill Ceverha which, if passed, would have limited the Attorney General's actions to compromise certain litigation in federal court (including that involving the constitutionality of a state law) "unless the state agency represented by the Attorney General consented to the settlement or judgment." The House Committee on State Affairs commented that Texas law granted such authority to the Attorney General by direct inference. First, this entire analysis is irrelevant to whether a defendant class of city, county and district attorneys may defend themselves in federal court (since they were clearly not state agencies). Further, the elevation to the level of statutory law of a comment by a legislative committee to the effect that direct inferences from unidentified sources grant authority to the Attorney General to take certain action is without merit.

Article IV, §22 of the Texas Constitution provides that the Attorney General may render advisory opinions to the Governor and other executive officers, but no part of the Texas Constitution provides that these Attorney General opinions are binding on these officers or on a court of law. In fact, the Texas Supreme Court has specifically held that such Attorney General opinions are merely advisory in nature and do *not* bind the State officers or agencies dealt with in such opinions; furthermore, these State officers and agencies are free to assert their own, contrary legal positions in litigation in the courts. *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

Accordingly, if the Attorney General's formal, constitutionally-authorized opinions are not binding on other State officers who may assert their own, contrary legal positions, even in litigation, it cannot possibly be said that the Attorney General's informal, non-constitutionally-authorized decision not to continue the appeal below is binding on Hill and the other district, county and city attorneys of Texas as true defendants in this case.

V.

THE FIFTH CIRCUIT DECISION ALLOWING HILL TO INTERVENE WAS CORRECT.

A. Hill's Intervention.

Separate and apart from Hill's standing as a party/class member and the class representative in the circuit court proceedings, he was a proper intervenor. The *en banc* court correctly opined that "the order granting intervention was justified because Hill's position satisfied the requirements of both Fed. R. Civ. P. 23(d)(2) and 24(a)(2)." *Baker v. Wade*, 769 F2d 289, 291-92 (5th Cir. 1985) (*en banc*). The *en banc* court correctly concluded that "[a]s a state official empowered by Texas law to enforce criminal laws, his [Hill's] interest and its impairment by the district court's judgment cannot be questioned." 769 F.2d at 292. With respect to the issues of timeliness and adequacy of representation, the *en banc* court

followed the established rule that "even where the interest of a person may have been adequately represented at trial, failure to take an appeal from an adverse judgment may introduce the element of inadequacy, entitling the interested person to intervene *after judgment* to file an appeal." *Nuesse v. Camp*, 385 F.2d 694, 704 n.10 (D.C. Cir. 1967) (emphasis added).

The present case is squarely on point with this Court's decision in *Bryant v. Yellen*, 447 U.S. 352 (1980). In *Bryant*, this Court "agree[d] with the Court of Appeals that the respondents who sought to enter the suit when the United States forewent an appeal from the District Court's adverse decision had standing to intervene and press the appeal on their own behalf." 447 U.S. at 366. Likewise, Hill, who sought to intervene in the suit when the Attorney General withdrew the State's appeal, has standing to intervene and press the appeal because he has a sufficient stake in the outcome of the controversy to afford him standing. 477 U.S. at 368.

The correctness of the *en banc* court's decision upholding the order allowing Hill's intervention is confirmed by the fact that, on several occasions, this Court "has allowed a non-party below, whose rights were vitally affected by the lower court's decision, to intervene, by motion in the Supreme Court, in order to file his own petition for certiorari where his interests, which were defended by the losing party below, had been abandoned by the losing party's failure to apply for certiorari." A. STERN, E. GRESSMAN, & S. SHAPIRO, SUPREME COURT PRACTICE §6.16 at 340 (6th ed. 1986). *See Banks v. Chicago Grain Trimmers*, 389 U.S. 813 (1967), 390 U.S. 459 (1968); *Hunter v. Ohio ex rel. Miller*, 396 U.S. 879 (1969). *Accord McKenna v. Pan American Petroleum Corp.*, 303 F.2d 778, 779 (5th Cir. 1962) (recognizing that a court of appeals may in appropriate circumstances "permit intervention where none was sought in the district court"). Furthermore, this Court where necessary has even "allowed certain persons to participate in the proceedings in order to protect their interests, regardless of whether they were parties or intervenors below." A. STERN, E. GRESSMAN, & S. SHAPIRO, SUPREME COURT PRACTICE §6.16 at 340 (6th ed. 1986).

See United States v. Terminal Railroad Ass'n, 236 U.S. 194, 199 (1915) (this Court allowed certain parties, who had been

denied intervention below, to intervene in pending appeals before the Court to protect their interests).

In any event, Hill did not need formally to intervene or be appointed class representative on appeal because, as a party defendant and member of the defendant-class, Hill already had the right to appeal, especially when the class representatives in the trial court failed to appeal and when the class was not given notice of a settlement adverse to it. These arguments have been fully briefed in Hill's Cross-Petition against the State, No. 85-1412, at 24-27, and the Court is respectfully referred to that section for brevity's sake herein.

B. If Hill Can Be A True Party For 42 U.S.C. §1988 Purposes, Hill Is A True Party Defendant As Well.

Contrary to the State's present protestations regarding potential attorneys fees being awarded against the State in this cause, Baker's counsel, James Barber, in answer to a specific question from the *en banc* panel at the Fifth Circuit oral argument, admitted and affirmed that he and his client would seek their attorneys fees in this case against Hill and his jurisdiction, Potter and Armstrong Counties, not against the State.[10] Furthermore, the district judge in this case has already indicated in no uncertain terms that if Hill does not prevail in this appeal, the district court will award Baker's attorneys fees against Hill and Potter County, not against the State. *Baker v. Wade,* 106 F.R.D. 526 (N.D. Tex. 1985) (Baker App. at 112a n.33). Thus, if Hill can be the true "non-prevailing party" for §1988 attorney's fees purposes by Baker's and his counsel's own admission and by statements of the trial judge, then Hill should certainly be a true party defendant and appellant for purposes of this appeal.

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[10] Mr. Barber also admitted, in response to a direct question from Judge Jones at *en banc* oral argument, that he and his client had entered into a settlement with the Attorney General to reduce their earlier fee award from the district court in return for the State dropping its then-pending appeal to the Fifth Circuit. Thus, Baker's allegation at page 14 of the Baker Petition that Texas has already been assessed more than $80,000 in costs and fees is no longer correct; the settled fee is less and cannot increase.

VI.

THE STATE HAS WAIVED AND IS ESTOPPED FROM ASSERTING ANY OBJECTION TO HILL'S STANDING AND ITS ARGUMENT THAT THE STATE IS THE TRUE PARTY IN INTEREST

The State's claim that the State is "the real party in interest in this case" confuses the concepts of "real party in interest" and "capacity to be sued." In addition, the State has waived any right to make this claim and so challenge the capacity of Hill as a true defendant under Federal Rules of Civil Procedure 9 and 17. The authorities on this issue have been explained fully in Section I.E of the argument in Hill's Cross-Petition against the State (No. 85-1412), and for brevity's sake, the Court is respectfully referred to that section. The State has waived and is now estopped to raise any such challenge against Hill.

CONCLUSION

The case at bar, with its unusual defendant class of all state district, county, and city attorneys, with the State Attorney General dropping an appeal and later attempting to reintervene in the same appeal, and in which a class member filed his own timely notice of appeal when the original named class representatives failed to timely appeal, is so procedurally unique that, in all probability, such a case will never recur. As discussed above, Baker's counsel admitted at *en banc* oral argument that he would never structure a case in this fashion again, and new militant homosexual challenges to state sodomy statutes (such as that of Louisiana) have declined to adopt this defendant-class tactic. Therefore, since the relevant facts related to the Attorney General's petition are unlikely to recur and involves solely the unique claims of the instant parties, this cause does not provide an appropriate vehicle for the Supreme Court to exercise its discretionary certiorari jurisdiction.

Finally, it seems inappropriate for the Court to involve itself in a contest between two State officials regarding matters of Texas state law and authority. A similar rationale was employed by this Court to dismiss certiorari in *New York v. Uplinger*, and the Court should consider this aspect carefully in acting upon the instant Petition.

For all of the above reasons, the State's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the above and foregoing have been mailed, by Certified Mail, Return Receipt Requested, to all attorneys of record on this 26th day of March, 1986.

/s/ WM. CHARLES BUNDREN

Wm. Charles Bundren

Supreme Court, U.S.
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No. 85-1251

In the Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF TEXAS,

Petitioner,

v.

DANNY E. HILL,

Respondent.

On Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit

Brief Amici Curiae for the States of Alabama, Delaware, Florida, Illinois, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Utah, Vermont, West Virginia, Wisconsin and Wyoming

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INTEREST OF AMICI

The Attorneys General of the *amici curiae* State of Oregon, et al., sponsor this brief to prevent the fragmentation of centralized state legal authority by lower federal courts.[1] *Amici* states entreat this Court to exercise its certiorari review and to reverse summarily the decision of the United States Court of Appeals for the Fifth Circuit in *Baker v. Wade*, 774 F.2d 1285 (5th Cir. 1985) (*en banc*). Specifically, *amici* urge review of the court of appeals' jurisdictional determination that a local government legal officer may override a decision of the state's Attorney General to withdraw a state's appeal of a district court judgment declaring a state criminal statute unconstitutional. Because the Fifth Circuit's resolution of this threshold issue is clearly wrong and poses significant adverse consequences for the states and their chief law officers, the lower court decision should be reversed summarily.

For *amici* states, the Fifth Circuit's determination, that a county prosecutor may displace a state's Attorney General as the exponent of state legal policy in federal appellate courts, threatens the structure and foundation of government legal services. By constitutional mandate, legislative provision, and judicial directive, *amici* have built their structures for government legal representation on and around their respective Attorneys General, designated as the chief law officers of the states. The designation is no mere ceremonial trapping.

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[1] This brief of *amici curiae* is filed pursuant to Rule 36.4 of the Rules of the Supreme Court. The *amici* states are listed in the Appendix to this brief.

This brief is in support of the Texas petition for certiorari in this case, and not also the petition for certiorari in *Baker v. Wade*, (No. 85-1225), solely because a number of *amici* states either do not support or have no interest in Questions Two and Three of the Questions Presented in that petition.

The responsibility of the Attorney General as chief law officer is to discern, develop, present, coordinate and evaluate the legal policy of a sovereign state. The role of the Attorney General is to ensure that the state's legal position is presented in a principled and consistent manner, and not in a disjointed fashion that mirrors a lack of consensus among various governmental officials and engenders confusion in the courts and among the public. To forestall these undesirable consequences, *amici* states, as a matter of law, have entrusted their respective Attorneys General with singular responsibility to control state legal policy.

The Fifth Circuit, however, ignored the allocation of legal authority in the State of Texas, and apparently would allow the single voice of the Attorney General to be drowned by a cacophony of lower-level officials. *Amici* states are concerned that a local prosecutor apparently did not appreciate the mandate of the Attorney General and its procedural significance in this case; but we are seriously troubled by the court of appeals' failure to recognize the proper legal representative of the state. The court of appeals' utter disregard of the Texas Attorney General's clearly established prerogative to control litigation against the state sends an inappropriate and potentially disastrous signal to lower echelon and nonlegal state policymakers: If you disagree with the Attorney General's legal advice and litigation strategy, you may be treated as a spokesperson for the state in the federal courts. *Amici* states ask the Court to dispel this disturbing message and to restore the stability which state legal services programs were designed to foster, and which the lower federal court mistakenly upset.

SUMMARY OF ARGUMENT

Review of the Fifth Circuit decision that a county prosecutor, rather than a state Attorney General, was the legal spokesperson for the state in federal court, is warranted for two compelling reasons. First, the court of appeals ignored this Court's directive to observe the prerogative of the state to designate its representative in the federal appellate

courts. Second, the Fifth Circuit consequently ignored the state's choice to be represented by its Attorney General. The significance of these omissions transcends this particular case, because the court of appeals established a precedent that strikes at the underpinnings of a structure for allocation of state legal authority among government officials that strongly resembles the legal services policies of all fifty states.

As the size and responsibilities of state government have grown, the demands of the state and its instrumentalities for legal services have increased. But growth has spawned the need for issue control as well as quality control. Here, the lower federal court's failure to recognize the state's designated law officer as its spokesperson in this case undercuts attempts by other states to coordinate, control, and centralize the development and presentation of legal policy through their Attorneys General. These sovereign efforts to consolidate legal authority in the office of Attorneys General will be thwarted under the Fifth Circuit's rationale.

At least in the federal courts, the Attorney General would not be able to prevent other state and local government officials from pursuing cases and issues through litigation and appeals, even if the Attorney General determined that further litigation was not in the best interests of the state and the development of its legal policy. Similarly, under the Fifth Circuit's rationale, other state and local government officials in effect could take a case away from the Attorney General by moving, in the state's name, for an order of dismissal from a result-driven federal court motivated to overlook state law allocating the state's legal authority to the Attorney General. As precedent, the court of appeals' ruling on the issue of representation of the state is a blueprint for sabotage of centralized structures for delivering government legal services.

Short of outright sabotage, the Fifth Circuit's jurisdictional decision maps a road to financial disaster for state

government insofar as the decision permits government officials to circumvent the control of the Attorney General, press ill-considered claims or defenses in the name of the state, and pass adverse cost and attorney fee awards on to the state treasury. Given the potential for this adverse development, the course marked by the Fifth Circuit is all the more surprising because federal practices, procedures, rules, and statutes recognize that state Attorneys General should be accorded a special role in federal litigation.

Thus the court of appeals' decision below constitutes a marked departure from the norm for relations between the federal judiciary and a state's chief law officer. A sharp course correction is required. This Court should issue a writ of certiorari and summarily reverse the court of appeals' decision in *Baker v. Wade*.

ARGUMENT

The threshold and, we submit, dispositive question presented in this case is whether a federal appellate court can ignore the decision of a state's chief law officer effectively to dismiss an appeal of an adverse trial court judgment on an issue of state-wide legal importance. To state the issue is to resolve it; clearly, as a matter of federal appellate practice and state law, a federal court must respect the decision by a state Attorney General to withdraw an appeal of a judgment declaring a state criminal statute unconstitutional, when a state has designated the Attorney General as its sole legal representative. Due deference to federal precedent and to the authority conferred by state law on its Attorney General mandated dismissal of the appeal in this case. Yet a divided Court of Appeals for the Fifth Circuit considered this case on the merits at the behest of a lower-level government officer who disagreed with his Attorney General. As a matter of law, the procedural ruling of the court of appeals constitutes a flagrant breach of fundamental principles of federalism. In practice,

the procedural ruling threatens deleteriously to affect state legal representation, state treasuries and federal court dockets.

I. The Fifth Circuit's Substitution of a Local Prosecutor for the Texas Attorney General as the Legal Officer Entitled to Represent the State's Interests Was Clear Legal Error.

At the heart of the significant state-federal relations problem posed by the Fifth Circuit's *en banc* decision is the question of the scope of a state's authority to direct and control representation of the state's interests in federal court. The answer should be easy: The state's power in this respect is plenary. In our federal system, states are full partners with the national government, entitled to autonomy in the conduct of their core operations. Because of their status as coequal sovereigns, each state's authority to structure a politically accountable system for the development and advocacy of state legal policy is beyond dispute. This Court therefore readily has recognized that "[t]he allocation of authority among State officers to represent the State before this Court is, of course, wholly a matter of State concern." *New York v. Uplinger*, 467 U.S. 246 n. 1 (1984). The same necessarily is true when a state's interests are adjudicated by lower federal courts.

When the court of appeals in this case was confronted with a dispute among state officials over which one properly could press or dismiss the appeal, the lower appellate court should have turned to Texas law. Had it done so, resolution of the controversy would have been a straightforward matter. As the petition for certiorari filed by the State of Texas amply demonstrates, Texas law allocated to the Attorney General the exclusive authority to represent the state's interests and to control the state's participation in the litigation below. Pet.

for Cert. (No. 85-1251), pp. 12-15.[2] The Fifth Circuit's failure to consult Texas law and its cavalier substitution of a local prosecutor for the legal representation of the state's attorney general was plainly wrong. More troubling, the lower court's action implied a fundamental disrespect for the state's sovereign authority and it seriously disrupted proper state-federal relations in this crucial area.

There is no excuse for the Fifth Circuit's error. In a declaratory judgment action brought to challenge a state statute, the only real defendant party in interest is the state. A federal court presented with such a challenge fairly can and should presume that the proper representative for the state and any named state officials is the state's Attorney General.

The venerable office of Attorney General exists in all fifty states, and also in Puerto Rico, Guam, American Samoa and the Virgin Islands. *Powers, Duties and Operations of State Attorneys General*, Nat'l Ass'n of Att'ys General at 29, (October, 1977). Although the source and scope of their powers and duties vary, state Attorneys General typically are the chief law officers of their states. Each is entrusted with the duty of representing the state and controlling its legal position in all litigation to which the state is a party or in which it is interested. *See generally Powers, Duties and Operations of State Attorneys General*, Nat'l Ass'n of Att'ys General (October, 1977). Indeed. state Attorneys General have played such an important part in American jurisprudence as protectors of the public interest, defenders of the legal interests of the state, and law enforcement officers that their roles commonly are protected and recognized in state and federal declaratory judgment acts. Borchard, *Declaratory Judgments*

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[2] *See also* the thorough discussion of Texas law set out at pages 18-20 in the related Petition for Certiorari in *Baker v. Wade*, (No. 85-1225) filed by Donald F. Baker, plaintiff below.

at 274-276 (2d ed. 1941). *See, e.g.*, Uniform Declaratory Judgments Act § 11 and 28 U.S.C. § 2403(b). *See also* Sup. Ct. Rule 28.4(c).

The presumption that a state's Attorney General properly directs the state's representation in litigation challenging a state statute should fail, if at all, only when that officer's authority is genuinely disputed. If such a dispute arises, the controversy frequently can be resolved by consideration of state constitutional and statutory provisions. In the rare instances in which a federal court must look further, state case law often will provide an adequate answer.

Many state courts, including those of several of the *amici*, have resolved litigated controversies between state Attorneys General and other state officials or entities over their respective authority to direct litigation involving the state. Disputes commonly have focused on a state agency's claim of authority to obtain independent legal representation when the Attorney General refuses to institute litigation on the agency's behalf, *e.g.*, *Frohnmayer v. SAIF*, 294 Or. 570, 660 P.2d 1061 (1983) (upholding Attorney General's exclusive representation and authority to set state legal policy); an executive branch official's claim of authority to compel an Attorney General to pursue an appeal that the chief law enforcement officer has refused to press, *e.g.*, *Secretary of Administration & Finance v. Attorney General*, 367 Mass. 154, 326 N.E.2d 334 (1975) (upholding Massachusetts Attorney General's authority); and a local prosecutor's claim of authority to control criminal litigation when that official disagrees with an Attorney General's litigation strategy or judgment, *e.g.*, *State v. Finch*, 128 Kan. 665, 280 P. 910 (1929) (Attorney General may control prosecution without the concurrence of and in opposition to

the county prosecutor).[3] Historically, state courts generally have demonstrated a preference for vesting strong powers in the Attorney General. *See generally State ex rel. Derryberry v. Kerr-McGee Corp.*, 516 P.2d 813 (Okla. 1973) and discussion therein. The modern trend is toward consolidation of all state legal authority in a centralized Attorney General's office, with a consequent further strengthening of the scope of the Attorney General's powers and duties. *See generally Powers, Duties and Operations of State Attorneys General*, Nat'l. Ass'n of Att'ys General (October, 1977). But there is, as there should be under our federal system, diversity among the several states, and state structures for provision to government of legal representation and advice are not uniform. *Compare Santa Rita Mining Co. v. Department of Property Valuation*, 111 Ariz. 368, 530 P.2d 360 (1975) (state Attorney General may not appeal against the wishes of his state agency client) *with Feeney v. Commonwealth*, 373 Mass. 359, 366 N.E.2d 1262 (1977) (state Attorney General may pursue appeal despite objection of the Governor and the state official represented in the case).

The point is not that there must be a single answer when an Attorney General's authority is questioned, only that there must be a correct one. For a federal court to arrive at the accurate resolution of a dispute over the allocation of legal authority among state officials, it must be willing to ask the correct question in the first instance. That question is straightforward: What is the state's law? If the answer is not

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[3] Other representative cases in which a state Attorney General's authority has been upheld when other state officials have challenged it or attempted to act independent of the Attorney General's representation include *State ex rel. Sendak v. Marion County Superior Court*, 268 Ind. 3, 373 N.E.2d 145 (1978); *State Health Planning and Coordinating Council v. Hyland*, 161 N.J. Super. 468, 391 A.2d 1247 (1978); *Environmental Protection Agency v. Pollution Control Bd.*, 69 Ill.2d 394, 372 N.E.2d 50 (1977); *Wyman v. Danais*, 101 N.H. 487, 147 A.2d 116 (1958).

immediately apparent, and there is no case law on point, two courses are available.

The first, and preferable course, is to certify the issue to the state's highest court for its resolution. This Court, in fact, has used that procedural vehicle to determine the authority of the Massachusetts Attorney General to appear before it when both the Governor of Massachusetts and the state officers on whose behalf the Attorney General appeared objected to the appeal. *Massachusetts v. Feeney*, 429 U.S. 66, 67 (1976). That procedure brought about a definitive answer from the highest court of Massachusetts, which upheld the Attorney General's authority. *Feeney v. Commonwealth*, 373 Mass. 359, 366 N.E.2d 1262 (1977). Where a state has a process by which issues of state law can be certified to the state courts, exercise of that option permits state courts to address the problem in the first instance. This has the advantage of providing the federal court with an authoritative, and by definition correct, resolution of the issue.

If certification of the issue to the state is not available or workable, the federal court may itself review state statutes, constitutional provisions and case law to attempt to discern the proper result. Any such inquiry by the federal courts should be undertaken cautiously, with due concern for the inherently limited role federal courts can and should play in the explication of unsettled state law questions.

Whichever course is followed, a federal court must remain mindful that its inquiry is to be focused on state law. Its task is to attempt to determine what state courts would hold, not to provide the federal court's idea of a proper resolution.

Significantly, the Fifth Circuit has correctly approached and resolved a similar controversy previously. In *State of Fla. ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, *reh. denied* (5th Cir. 1976), several major oil companies challenged the Florida Attorney General's authority to initiate a complex antitrust

suit against them. The Fifth Circuit, implicitly recognizing that the question was wholly a matter of state concern, thoroughly and painstakingly looked to relevant Florida statutory, constitutional and decisional law for the answer. *Id.* at 268-277. The court also considered certification of the issue to the state courts, although for seemingly sound reasons it declined to follow that course. *Id.* at 274-276. The Fifth Circuit's careful study and correct approach to the problem in the Florida case renders that same court's high-handed disregard of the sensitive state-federal relations issue in this Texas case all the more puzzling, and all the more plainly wrong.

II. Certiorari Review and Summary Reversal Are Warranted to Forestall the Adverse Practical Impacts of the Court of Appeals' Procedural Decision.

As the foregoing discussion readily demonstrates, the establishment by states of systems of centralized government legal services have engendered challenges in the state court arenas. State courts, recognizing the practical benefits of centralized legal services systems, resoundingly have rejected those challenges. Now, however, the court of appeals' decision below breathes new life into otherwise moribund attempts to circumvent the authority of the states' chief law officers. Although the petitioners State of Texas and Donald Baker call this Court's attention to the adverse practical ramifications of the procedural ruling below, *amici* states appear before the Court to underscore those important points and to demonstrate that critical national interests are at stake in this case.

The parties are not merely building their case with academic arguments when they characterize the Fifth Circuit ruling as a serious threat to an otherwise sound system for state legal services. State Attorneys General routinely must

resolve myriad issues of state legal policy from a broader perspective than state agency personnel or lower government officers who may have narrower programatic or discrete, case-intensive goals in mind. Most often, mutual accommodation can be and, in fact, is reached. The competition of ideas is healthy, and law development generally benefits from an airing of different views, but only so long as the competition does not spill out into courtroom confrontations between state policymakers.

If a prosecutor with only local authority or a state agency official with only program policy responsibility can, over the Attorney General's objection, force the state into court or scuttle the state's position in pending litigation, the public and the court truly are presented with these quandaries: What is the state's legal position? Who is the responsible legal policy maker? Which agency budget is accountable for the costs of litigation?

We would have thought that the need to dispel these quandries satisfactorily had been met in Texas and most other states by state laws and court decisions establishing and affirming the singular authority of the Attorney General, but the court of appeals' majority ignored this important development. Instead, the Fifth Circuit opened a new forum — the federal courts — for the consideration and resolution of state legal policy disputes between a state's chief law officer and recalcitrant government officials. The court of appeals thus exposed the federal court system itself, as well as state legal services programs, to a new round of litigation, not on the merits of federal questions, but on authority of state Attorneys General to speak for the states. And the increased costs in terms of judicial and legal resources are not the only adverse fiscal portents of the procedural decision below. The Fifth Circuit has exposed state treasuries to the costs, including attorney fees, of unsuccessful litigation maintained in the

name of public officials acting in contravention of the legal judgment of state Attorneys General.

Just as we thought that deference to state law would have foreclosed the Fifth Circuit's opening of Pandora's box, we believed that federal policy toward state Attorneys General would have sealed, in this case, the question of who speaks for the state in federal court. Federal statutory law, 28 U.S.C. § 2403(b), requires certification of issues of the federal constitutionality of state statutes to state Attorneys General in order to "permit the *State* to intervene," when the state is not otherwise appearing as a party itself or through a party that is a state agency, official, or employee.[4] The evident policy behind this statute is to secure the representation of the state's interests by its Attorney General. But in derogation of this policy, the Fifth Circuit majority displaced the Texas Attorney General and allowed a lower-level government official to speak for the State of Texas. This decision is not only anomalous, it is so fraught with undesirable complications for the offices of state Attorneys General and for state-federal relations that extraordinary intervention by this Court is warranted.

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[4] 28 U.S.C. § 2403(b) provides:

> (b) In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

In other instances, Congress similarly has presumed that a state's Attorney General is the correct party to represent the state in federal court. *See, e.g.*, 28 U.S.C. § 2252 (habeas corpus proceedings).

CONCLUSION

Once the Texas Attorney General exercised his prerogative to withdraw the state's appeal to the court of appeals, this case should have come to a close. The Fifth Circuit, however, cloaked a lower-level official with the authority to present his version of what the state's legal policy should be, and proceeded to the merits of a constitutional challenge to a state statute. Clearly, the lower appellate court was wrong. This Court should grant the petition for certiorari filed by the State of Texas to close the door to federal court litigation of spurious challenges to the authority of a state Attorney General to speak for a state. On the procedural ground that respondent Hill lacked the authority to pursue a state's appeal over the objection of the Texas Attorney General, the Fifth Circuit's decision should be reversed summarily.

Respectfully submitted,

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